Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

COMMENTS OF PAGEMART, INC.

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SUMMARY

PageMart is dedicated to providing cutting-edge, cost-competitive paging services on a nationwide basis. The hallmark of the paging industry is intense competition among providers, and it is essential to the continued health of this industry that the Commission impose the minimum possible level of regulation. The recent amendments to the Communications Act made by the Omnibus Budget Reconciliation Act of 1993 make clear Congress' view that some mobile services -- such as traditional paging services -- should be entirely free of the burdens of common carrier-style regulation. Congress also made clear that, even in circumstances in which a measure of regulation is appropriate, the Commission should favor competition over regulation, save for the bare statutory minimum intended to ensure basic public interest values.

In light of this Congressional mandate, all paging services (including both those currently regulated as private carriers and those currently regulated as common carriers) should be placed in the "private mobile service" category and accorded full interconnection rights. Assuming arguendo that the Commission feels compelled to regulate paging under the "commercial mobile services" category, there is no basis whatsoever for imposing on this highly

competitive industry anything more than the absolute minimum level of federal and state regulation required under the statute.

With regard to future PCS services, the Commission should impose a minimum level of regulation, to allow the maximum level of flexibility for PCS providers to respond to marketplace forces. This flexibility should include the right of each PCS provider to choose to offer private or common carriage services and to be regulated accordingly.

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PageMart, Inc. ("PageMart"), by its counsel, hereby responds to the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceeding.[1/] PageMart is a rapidly growing, innovative paging company, dedicated to providing cutting-edge, low-cost services on a nationwide basis. Utilizing primarily private carrier paging ("PCP") channels, the company is a leader in the implementation of advanced telecommunications technologies, including narrowband personal communications services ("PCS").

I. INTRODUCTION.

The instant rulemaking is designed to implement the "regulatory treatment" amendments to the Communications Act of 1934, as amended[2/] (the "Communications Act"), that

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1/ FCC 93-454, released October 8, 1993.

2/ 47 U.S.C. § 151, et seq.

were adopted in the Omnibus Budget and Reconciliation Act of 1993 (the "Budget Act").[3/] As is relevant here, the Budget Act amends Sections 3(n) and 332 of the Communications Act,[4/] creating a comprehensive framework for the regulation of mobile radio services, including existing common carrier mobile services, private land mobile services, and future services such as PCS.[5/] Under these amendments, mobile services are to be reclassified as either "commercial mobile services" or "private mobile services," and are to be regulated, respectively, as common carriers or private carriers.[6/] The statute delegates authority to the Commission to further define these terms through regulation.[7/]

3/ Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 393 (1993).

4/ 47 U.S.C. §§ 153(n), 332.

5/ All existing common carrier and private land mobile services, and all anticipated personal communications services ("PCS"), appear to fall within Section 3(n)'s general definition of "mobile services," thereby subjecting those services to regulation under Section 332. NPRM at ¶ 9. The Commission proposes to include within this definition all public mobile services regulated under Part 22, mobile satellite services regulated under Part 25, private land mobile services under Part 90, mobile marine and aviation services under Parts 80 and 87, personal radio services under Part 95, and personal communications services to be licensed under proposed Part 99. Id.

6/ 47 U.S.C. §§ 332(c)(1)(A), (c)(2).

7/ Id. at §§ 332(d)(1), (3).

It is clear from the Budget Act and its legislative history that Congress did not seek to impose regulation on mobile service providers without regard for the diversity -- in terms of technology, service offerings and competitive circumstances -- among the various companies that make up the industry. Rather, Congress sought to ensure that the level of regulation of similarly-situated mobile services will be roughly equivalent, and also that any such regulation be commensurate with the level of competitiveness in a particular industry segment.[8/]

As is demonstrated in detail below, traditional paging services do not fall within the category of "commercial mobile services." Paging companies -- including those presently categorized as common carriers -- should be treated as private carriers, with a right to interconnect with the public switched network ("PSN") consistent with the rights presently enjoyed by common carrier paging companies.

Alternatively, if the Commission determines that paging services must be regulated as common carriers, the fiercely competitive nature of this segment of the mobile services market justifies imposition of the minimum degree of regulation permissible, at both the federal and state levels.

[8/] See H.R. Rep. No. 103-213, 103rd Cong., 1st Session (1993) ("Conference Report"), at 490-491.

II. ALL TRADITIONAL PAGING SERVICES SHOULD BE CLASSIFIED AS PRIVATE.

Section 332(d)(1) of the Communications Act provides that a mobile service will be classified as a "commercial mobile service" (and will be subject to common carrier regulation) if it meets two criteria: the service (1) is "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public."[9/] Section 332(d)(2), in turn, defines "interconnected service" as a "service that is interconnected with" the "public switched network" or "service for which a request for interconnection is pending."[10/] While making clear that all mobile services are not necessarily commercial mobile services,[11/] Congress charged the Commission with defining the key underlying terms in these definitions: i.e., "effectively available to a substantial portion of the public"; "interconnected"; and "public switched network."[12/]

9/ NPRM at ¶ 10. Services that do not meet these criteria will be classified as private mobile services and will not be subject to common carrier regulation. 47 U.S.C. § 332(c)(2).

10/ Id.

11/ Conference Report at 496.

12/ 47 U.S.C. § 332(d)(1)-(2).

A. Paging Services Do Not Provide "Interconnected Service."

Traditional paging services -- whether provided today by a common carrier or a private carrier -- do not provide "interconnected service" within the relevant meaning of that term. Congress used the term "interconnected service" to identify those mobile services that provide to their subscribers -- as an essential feature of the service being offered -- the ability to access freely the PSN via the mobile service network for real-time, generally two-way communication. Mobile services that simply employ the PSN in an ancillary fashion -- e.g., as a means of supporting only a particular element of the service provided -- are not offering "interconnected service" in the statutory sense.[13/]

Had Congress intended that any interconnection with or use of the PSN whatsoever would fulfill Section 332(d)(1)'s interconnection requirement, it could have said so quite clearly. It did not. Instead, Congress directed the Commission to identify the level of interconnection that affords a mobile service customer sufficient access to the PSN to warrant regulating that service as a common carrier.

13/ "[I]nterconnected service must be broadly available" for a service to meet the statutory standard, as opposed to constituting merely "one aspect" of the service. Conference Report at 496.

The only Commission decision that even marginally supports the notion that any interconnection is enough -- the Commission's 1985 international separate satellite system policy[14/] -- was decided in a context so unrelated to the instant case that it is irrational to attempt to draw any parallels to it. Separate Systems prohibited any interconnection with the PSN by a non-Intelsat system, based solely on the unique requirements of Article XIV(d) of the Intelsat Treaty,[15/] which restricts the provision of international service to the public by satellites not part of the Intelsat system. It was felt that services not interconnected with the PSN were not provided to the "public" (within the meaning of the treaty), and therefore could be offered by a non-Intelsat system. The separate systems policy and its underlying rationale have nothing whatsoever to do with the instant case.[16/]

14/ Establishment of Satellite Systems Providing International Communications ("Separate Systems"), 101 F.C.C.2d 1046 (1985), on reconsideration, 61 R.R. 2d 649 (1986), further reconsidered, 1 F.C.C. Rcd. 439 (1986).

15/ INTELSAT Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, 3853, TIAS No. 7532.

16/ It should be noted that the Commission has since eliminated the PSN-related restrictions on separate systems, without necessarily altering the private carrier status of those systems. See Permissible Services of U.S Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 F.C.C. Rcd. 2313 (1992).

The best example of the subtle distinctions that Congress sought to draw in Section 332 can be found in such cases as In Re Data Com.[17] There, the Commission concluded that interconnected service was not being offered by a PCP provider, because persons wanting to contact a subscriber telephoned an answering service, which then paged the subscriber using a private radio link.[18] Because the caller could not directly activate the transmitter, the connection with the PSN -- access to the answering service -- was deemed inadequate to qualify as a true, interconnected service.[19] In the NPRM, the Commission correctly analogizes the Data Com situation to a state-of-the-art paging system utilizing "store and forward" technology, where the caller "has no more control over the transmission of the message than a caller seeking to send a message through a licensee-operated answering service (as was the case in Data Com)."[20]

In essence, a paging company employs the PSN solely to gather requests for the activation of its mobile network. That interconnection merely provides an interface point, through which the public can contact the mobile

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17/ 104 F.C.C.2d, 1311, 1312-16 (1986).

18/ Id.

19/ Id. See also 47 C.F.R. § 90.7; NPRM at ¶ 20.

20/ NPRM at ¶ 21, note 25.

network, but not use the network itself. This limited gateway function does not provide the sort of unfettered real-time, two-way access to the PSN that was the focus of Congressional concern. Only the most rigid analysis -- which ignores altogether both the vast distinctions between different types of mobile services and Congress' clear desire to recognize those distinctions -- could lead to the conclusion that traditional paging services provide a sufficient level of interconnection to the PSN to warrant treatment as a commercial mobile service.

B. Paging Services Are Not The "Functional Equivalent" Of Commercial Mobile Services.

Two types of service fall within Section 332(d)(3)'s definition of "private mobile service." First, there are those that simply do not meet Section 332(d)(1)'s definition of "commercial mobile service." Second, there are services that, while they may, on their face, meet that definition, they nonetheless do not provide the "functional equivalent of a commercial mobile service" and, thus, should not be treated as such.[21/]

The legislative history makes clear that the "functional equivalent" exception was intended to enable the Commission to classify a mobile service as private, despite the fact that such service might otherwise fall within the

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[21/] Id. at ¶ 28.

literal definition of a commercial mobile service. If a service is not "functionally equivalent" to a commercial mobile service -- the services that Congress sought to subject to common carrier regulation -- then there is no reason to impose on that service a regulatory regime intended for others.

The example of such an exempted service provided in the Conference Report is most illuminating:

> [A] mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licenses, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or similar wide geographic area.

Conference Report at 496.[22/]

This example suggests a flexible standard for assessing functional equivalency, taking into account both

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22/ The possible alternative interpretations of the function equivalency test that are considered in the NPRM are flawed on their face. The suggestion that a mobile service that does not squarely meet the statutory test still could be classified as a commercial mobile service if it was a "functional equivalent of such a service" ignores the sole example provided by the Conference Report. If Congress had intended to broaden the scope of services included within the commercial mobile services category -- rather than narrow it -- then it would have made no sense to provide as an example a technology that should not be regulated as commercial mobile services, even though it meets the basic statutory definition.

technological factors and consumer perception. Traditional paging services are not cellularized, nor do they employ other forms of "channel augmentation" technology or operate on a SMSA-type of basis. Certainly, consumers do not mistake paging for, e.g., cellular (as opposed to the average consumer's inability to distinguish between cellular and ESMR). Assuming arguendo that the level of interconnection with the PSN generally employed by paging systems is considered to be adequate to meet the commercial mobile services criterion, the "functional equivalency" exemption dictates that they nonetheless should not be regulated as commercial mobile services.

C. All Paging Systems Regulated As Private Carriers Should Be Guaranteed The Right To Interconnection With The Public Switched Network at Reasonable Rates.

As demonstrated above, paging services do not provide PSN-interconnected service in the sense contemplated by Section 332(c)(1) and, therefore, should be regulated as private carriers. Nonetheless, it is critical that all paging systems be granted interconnection rights equivalent to those presently enjoyed by common carrier paging companies, even if such systems henceforth are designated as private.[23/] There is no doubt that the Commission has the

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23/ The right of a paging carrier to obtain a certain type of interconnection from an LEC must be distinguished (continued...)

authority to require, e.g., local exchange carriers ("LECs") to provide interconnection to private carriers as part of its jurisdiction to regulate interstate service.[24/] Nothing in the Budget Act indicates that this authority has been circumscribed, or that existing case law extending interconnection rights to private carriers is no longer valid.[25/]

Indeed, just the opposite is true. Congress clearly established a framework that permits (indeed, requires) the Commission to regulate all traditional paging services as private. Had Congress intended that, as a consequence of being placed in the private category, present-day common carrier paging systems would lose their existing interconnection rights -- a result that would represent a drastic reworking of basic technical and economic assumptions underlying the industry -- it would have said so.

Finally, permitting state regulation of either the right to interconnect, or the type of interconnection

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[23/] (...continued)
from the separate issue of whether the nature of that interconnection is such that a paging company would meet the definition of a commercial mobile service provider. Clearly, these two references to PSN interconnection are distinct.

[24/] NPRM at ¶ 72.

[25/] Id.

permitted for intrastate paging service, or the rates to be charged for such interconnection, would negate the important federal purpose of guaranteeing unfettered interconnection to the interstate network.[26] To ensure a seamless transition to the new regulatory regime -- as well as the continued development of a robust, competitive paging industry -- the Commission should preempt all state regulation of paging interconnection, including rates.

With regard to rate regulation, it seems clear from the Commission's precedents that, as opposed to the cellular context, paging interconnection rates could be preempted in a manner consistent with Louisiana Public Service Commission v. FCC ("Louisiana").[27] For example, in In Re The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services,[28] the Commission declined to regulate rates for cellular interconnection because the interstate and intrastate elements were segregable.[29] That is not the case for paging; save for the smallest local system situated well away from a state boundary, there is no way to identify the interstate/intrastate destination of a page. If traffic

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[26] Id. at ¶ 71.

[27] 476 U.S. 355 (1986).

[28] 2 F.C.C. Rcd. 2910 (1987).

[29] Id. at 2911-12.

cannot be segregated, then neither can costs, in which case the Commission would appear to have full authority under Louisiana to protect the overriding federal interests.

III. EVEN IF THE COMMISSION DETERMINES THAT PAGING SERVICES MUST BE CONSIDERED COMMERCIAL MOBILE SERVICES, THE COMMISSION SHOULD FOREBEAR FROM APPLYING ALL BUT THE MANDATORY TITLE II REGULATIONS.

Assuming arguendo, that the Commission finds that paging services must be regulated as commercial mobile services, the Commission should impose the least regulation permissible under Section 332. To do otherwise would only serve to increase costs for a highly competitive service, costs that would inevitably be passed on to the consumers, with no counterbalancing public interest benefits.

Under amended Section 332, the Commission is granted explicit authority to exempt commercial mobile service providers from all of the provisions of Title II, other than Sections 201, 202, and 208.[30/] The Conference Report notes that "market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services."[31/]

30/ 47 U.S.C. § 322(c)(1)(A).

31/ Conference Report at 491.

To exempt a given commercial mobile service from the application of a particular provision of Title II, the Commission must make the following three-pronged determination:[32/]

> (1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such provision is not necessary for the protection of consumers; and
>
> (3) specifying such provision is consistent with the public interest.

As part of evaluating the "public interest," the Commission must consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile services."[33/] Paging services clearly meet all of these requirements.

First, paging is one of the most competitive, low-cost telecommunications services available today.[34/] PCP

32/ NPRM at ¶ 57.

33/ 47 U.S.C. § 332(c)(1)(C).

34/ The hallmark of the paging industry is intense competition among service providers. Over the past decade, the variety of services offered has multiplied dramatically, and prices have declined sharply. Historically, the paging industry has been highly fragmented, with a large number of small, local

(continued...)

companies are essentially unregulated, and even on the common carrier side, service providers have been declared to be non-dominant and, thus, subject to minimal regulation.[35/] This highly competitive industry will become even more so, as the retail distribution of pagers becomes commonplace as the result of recent Commission initiatives.[36/]

Second, regulation of paging services is not necessary for the protection of consumers. Because of the wide availability of alternative paging suppliers, if carriers attempted to charge unreasonable rates, or to discriminate unreasonably, customers would simply take their business to other providers. Increased regulation could have the perverse effect of reducing consumer protections, because it could very well dissuade new entrants or convince existing competitors to move their resources to unregulated fields.

Finally, there can be no doubt that existing market conditions ensure the lawfulness of rate levels and

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[34/](...continued)
operators. Currently, approximately 60% of the market is divided among over 600 licensed paging companies, many of whom choose to provide only local services.

[35/] NPRM at ¶ 63.

[36/] See Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, 8 F.C.C. Rcd. 4822 (1993).

rate structures of carriers -- such as the average paging company -- which lack market power. In the paging industry, marketplace forces can and do prevent unreasonable behavior, and therefore forbearance from excessive regulation for these carriers will not harm consumers and will otherwise serve the public interest. Only the minimum degree of regulation permitted by statute is warranted in this case.[37/]

IV. THE COMMISSION SHOULD GIVE ALL MOBILE SERVICES LICENSEES, INCLUDING PCS PROVIDERS, AS MUCH REGULATORY FLEXIBILITY AS POSSIBLE.

PageMart urges the Commission to encourage innovation and efficiency by permitting mobile service providers the maximum degree of flexibility in structuring their services, both from a technical and marketing perspective. For example, the Commission should give licensees the option to provide both commercial and private mobile services under a single license. Licensees also should be permitted to change the nature of the services they provide -- and their regulatory status -- during the term of a license, either by filing a license modification

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37/ This conclusion applies with equal force at the state level. Thus, assuming arguendo that the Commission determines that paging should be subject to treatment as a commercial mobile service, the federal preemptions discussed supra, in the context of regulating paging on a private carriage basis, are equally appropriate under a common carrier regulatory scheme.

application or, alternatively, simply by notifying the Commission. The Commission can rely on the marketplace to ensure that each licensee is complying with the requirements of its license.

This is particularly the case with regard to PCS. As the Commission notes, "regardless of whether PCS is determined to be a private or common carrier service, there will be no monopoly service provider, therefore reducing the need for government to protect customers from abuses stemming from market power."[38/] It is clearly in the public interest for the Commission to forbear from over-regulating new, innovative technologies and services.

A. Personal Communications Services ("PCS") Should Not Be Uniformly Treated As Commercial Mobile Services.

PageMart agrees with the Commission's conclusion that all PCS should not be uniformly treated as a commercial mobile service.[39/] Even if, as the Commission anticipates, the PCS rules will require licensees to provide some form of broadly available service in their license areas, the question remains whether such service will meet the statutory requirement that they be providing "interconnected service." There likely will be applications of PCS that are

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38/ NPRM at ¶ 62.

39/ Id. at ¶ 45.

not interconnected to the public switched network, or that are not offered to a substantial portion of the public.[40/]

Consistent with the goal of flexible regulation, PCS licensees should be permitted to choose whether to provide commercial or private mobile services, regardless of frequency assignment.[41/] If PCS is to be an efficient, low cost service, licensees must be permitted the maximum level of flexibility in designing their systems. It would be counterproductive, for example, to insist on a "threshold" level of commercial mobile service. Instead, consistent with Commission precedent,[42/] PCS providers should be permitted to choose whether to be primarily commercial service providers or private mobile service providers, and should be permitted to offer the alternative type of service on either a secondary or co-primary basis under a single license. Market forces, rather than regulation, will ensure that PCS services are broadly available to the public.

[40/] Id.

[41/] Id. at ¶ 46.

[42/] Id. at nn. 67 & 68.

B. PCS Providers Should Have Interconnection Rights And Obligations Equivalent To Those Of Other Providers.

PageMart supports the Commission's conclusion that PCS providers should have a federally protected right to interconnect with local exchange carrier ("LEC") facilities regardless of whether they are classified as commercial or private mobile service providers, and that inconsistent state regulation should be preempted.[43] As is the case with paging services, nothing in the recent amendments to Section 332 suggests that private PCS providers should receive less favorable interconnection than commercial PCS providers. Similarly, the legislation should not affect the Commission's earlier proposal that PCS providers be entitled interconnection of a type that is reasonable for their system and no less favorable than that offered by the LECs to any other customer or carrier.[44]

In this regard, it will be critical to the development of PCS systems for the Commission to require the LECs to file tariffs specifying their PCS interconnection charges. This is particularly important in cases in which the LEC is in direct competition with a new PCS system, e.g., where the LEC offers competing PCS or cellular service.

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[43] Id. at ¶ 73.

[44] Id. at ¶ 75.

C. The Commission Should Preempt State And Local Regulation Of PCS Now.

The Commission proposes to reserve the right to consider the preemption of state and local regulation at a later time, but not to impose such preemption at the present time.[45] PageMart urges the Commission to reconsider this proposal. The ramifications of ill-conceived state and local regulation of PCS could prove difficult, if not impossible, to unravel at a later date. The damage to the development of the industry most likely would have already been done. The Commission should prevent the imposition of unnecessary regulation of PCS by preempting state and local regulation as part of this proceeding.

CONCLUSION

This proceeding will have a far-reaching impact on the development of all mobile services. The paging industry and its customers will be best served by allowing paging providers to operate without unnecessary regulation. The intensely competitive nature of paging dictates that excessive regulation will only increase costs, resulting in less innovation, slower technological development and

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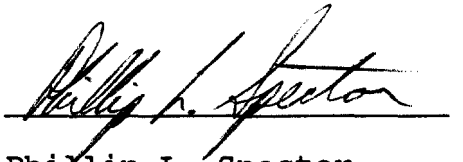
[45] Id.

restricted growth. PageMart urges the Commission to utilize the flexibility provided for in the Budget Act to minimize the regulation of paging services in the manner described above.

Respectfully submitted,

PAGEMART, INC.

BY: 

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